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IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA,) CRIMINAL CASE NO. 08-00004

Plaintiff,

vs.

**UNITED STATES RESPONSE TO
DEFENDANT'S MEMORANDA**

EUN YOUNG LEE,
aka Eun Young Cho,
aka Ina Lee,
MARCELINO J. LASERNA,
JOHN W.C. DUENAS,
MARY C. GARCIA,
JOSEPH PANGELINAN,
FRANCISCO SN KAWAMOTO, and
MARGARET B. UNTALAN,
Defendants.

I. JURY INSTRUCTIONS

The government agrees that jury instructions must await the end of the trial. The purpose of a trial memorandum is simply to alert the court to issues which, if raised, will require certain particularized instructions. Deliberate ignorance appears to apply to defendants' conduct, if Ina Lee was truthful in the statement she made to FBI S/A Ferguson on November 8, 2005:

"LEE is not paying anyone at [MVD] to help her secure Guam driver's licenses. LEE has befriended many GMVD employees by making Korean food for them and attending rosaries and the like. The GMVD employees, in turn, help LEE by just accepting her client's documents without scrutinizing them. They do this for her because they know her."

1 The evidence will show the six MVD examiner-defendants knew Lee was submitting
2 applications which contained false information, including false Taxpayer Identification
3 Numbers. (The terms “TIN” or Individual Taxpayer Identification Number, “ITIN,” both refer
4 to the taxpayer identification numbers issued by IRS and are used interchangeably). They
5 accepted these applications without the required supporting documents, and entered her “clients”
6 into the MVD computer without any scrutiny. An ignorance defense may apply if the defendants
7 say they did not know the applications were false because they did not read them, or demand the
8 usual supporting documents. It all depends on how the case proceeds at trial.

9 Defendants are wrong, however, when they contend that a deliberate ignorance
10 instruction only applies to drug charges. The instruction applies to every sort of offense. United
11 States v. Kelm, 827 F.2d 1319 (9th Cir. 1987), for example, concerned income tax fraud.

12 Defendants are also wrong to alleged that the government asserted in its trial brief that
13 United States v. Heredia, 483 F.3d 913 (9th Cir. 2007) overruled United States v. Jewell, 632
14 F.2d 697 (9th Cir. 1976 (en banc)). What the government said was, Heredia “has overruled an
15 extensive body of case law which evolved after the original Jewell decision.” This was based
16 upon the very words of the Ninth Circuit concerning whether motive was a required element of a
17 deliberate ignorance instruction:

18 “We conclude, therefore, that the two-pronged instruction
19 given at defendant’s trial met the requirements of Jewell and,
20 to the extent some of our cases have suggested more is required,
see page 920, *supra*, they are overruled.” Id. at 920. (Emphasis
added.).

21 Thus, if this instruction is ultimately given to this jury, the court cannot add the element, that the
22 defendants motive in deliberately failing to learn the truth was to give themselves a defense in
23 case they were ever charged with a crime.

24 II. UNCHARGED CONDUCT

25 The government has identified several other applications which were submitted by Lee,
26 which are not part of the present charge. Given that it will take months to verify the relevant
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1 TINs through the IRS, however, these applications will not be mentioned in this trial. Thus, the
2 only uncharged conduct relates to two applications processed by Vicente Pablo, Kyoung Kwa
3 BAEK (#29) and Young Hee LEE (#28), in August, 2004. On December 24, 2007, Lee
4 identified these two applications as among those she submitted using fraudulent TINs. The
5 government had deferred the investigation against Pablo until these people could be located and
6 interviewed. Two weeks ago, Young Hee LEE was arrested, and the government anticipates
7 renewing its investigation soon. The government believes testimony on these two applications is
8 admissible against Lee, because they are in inextricably intertwined with the other charges she is
9 facing.

10 III. PUBLICATION OF TAX DATA

11 Title 26, United States Code, § 6103(a) prohibits the IRS from releasing tax data or tax
12 returns. When this investigation started, the government had to obtain court orders, as required
13 by 26 U.S.C. § 6103(i)(1)(A), before the IRS could release this data to federal investigators. The
14 IRS documents consisted of a list of TINs which were fictitious, and the W-7 applications and
15 internal IRS computer printouts identifying the names of the real people who possessed some of
16 the TINs which the government was investigating. The government investigated 75 suspected
17 fraudulent licenses and has identified 54 to date (in addition to the one issued to Mike Park).
18 Some of the TIN records it received were legitimate and hence, not pertinent to this case. The
19 records which do apply to this indictment are contained in Exhibit 13, with the name of the TIN
20 holder, and other personal information redacted to preserve that person's privacy.

21 The government secured an order from this court, pursuant to 26 U.S.C. § 6103(i)(4)(A),
22 so that it could provide each defense counsel with the IRS documents. That order is attached
23 hereto as Exhibit 1.

24 Now, defendant Untalan has published some of those tax records. Her exhibit U-F
25 contains the name and date of birth of the person whose TIN was used by Ji Eon Lee(75) to
26 obtain a license in January, 2005.

1 Untalan's exhibits U-Q, U-R, U-S, and U-T display the names, dates of birth and TINs
2 belonging to persons living on Guam, who are not referenced in this indictment. They appear to
3 be persons for whom Lee obtained legitimate TINs, until December 17, 2003, when the IRS
4 changed its procedure to require that a 1040 tax return be filed with the W-7 TIN application.
5 The driver's licenses obtained in 2003 using these earlier TINs are legitimate, and have no
6 connection to the charges before this court.

7 Whether defendant has violated the Privacy Act of 1974 (5 U.S.C. 522a) is a matter
8 between her and the people whose privacy she has invaded. As it concerns this trial, it serves no
9 purpose to publish this private information. Accordingly, the government objects to the use of
10 these documents as trial exhibits, and suggests that the court order her to redact them in the
11 manner commonly employed for such private information, as illustrated by government's
12 Exhibits 13 and 14.

13 For the same reason, the court should allow the redacted tax information as shown on
14 Exhibits 13 and 14. All counsel have had the opportunity to verify that it is correct, and the
15 biographical information of these people is not pertinent to any matter at issue here.

16 IV. SUMMARIES AND A LIMITING INSTRUCTION

17 The government's trial memorandum addressed the admissibility of Exhibit 14 (and
18 necessarily Exhibits 68-73, which are break-outs by examiner). These are the only summaries
19 being offered under FRE 1006.

20 Exhibit 13, as stated above, concerns IRS records, which will be identified as business
21 records by Francine Prince of the IRS. Exhibits 2, 3, 4, 5, and 6 are business records which will
22 be identified by the Guam Rev & Tax computer analyst, Christine San Augustine. Ms. San
23 Augustine will explain the software programs associated with the issuance of Guam driver's
24 licenses: the information entered in the computer when an application is accepted, the successive
25 entries made by various personnel, and the data entered when the applicant finally gets his
26 operator's or chauffeur's license. This information can be retrieved by designated fields. Thus,
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1 Exhibit 2 is a retrieval by TIN of all the driver's licenses entered into the computer between
2 January 1, 2002, and January 18, 2006. That is, of all the people who used a TIN, rather than a
3 social security number, on their application. Exhibit 3 is a run of the same data, using the
4 "exam" field. Ms. San Augustine will explain how each line represents data entered every time
5 an applicant takes a test. Exhibit 4 is a run using the address field, Exhibit 5 lists the codes
6 assigned to various actions, and Exhibit 6 is a history of the particular applications charged in
7 this indictment, run by "record key," the unique number assigned to every application added to
8 the system. The admissibility of computer printouts was specifically approved in United States
9 v. Catabran, 836 F.2d 453 (9th Cir. 1988).

10 Defendants object to the government's summary exhibits on the grounds that the
11 government has not included every license processed by every examiner between 2002 and
12 2006. Given that these specific charges concern false TINs used by Korean citizens, licenses
13 issued according to social security number, for example, would be irrelevant. Defendants fail to
14 cite any authority which requires the government to offer evidence not directly pertinent to the
15 charges it has brought.

16 The authority cited by defendants is not relevant. It is routine for parties to produce
17 charts and summaries which explain and bolster their theory of the case. These summaries are to
18 persuade the jury that their theory is correct, and are not admissible. FRE 1006 concerns a
19 different kind of exhibit:

20 "The contents of voluminous writings, recordings, or photographs
21 which cannot conveniently be examined in court may be presented
22 in the form of a chart, summary, or calculation. The originals, or
23 duplicates, shall be made available for examination or copying,
24 or both, by other parties at reasonable time and place.
25 The court may order that they be produced in court."

26 The rule applies only to documents and photographs, and it does not require the documents
27 themselves to be entered into evidence. It does not permit the addition of materials extraneous to
28 the records themselves, nor does it permit any summary of witnesses or explanations of legal
theories.

1 Exhibits 14 is purely a summary of the records in Exhibits 2-6 and 13; it does not contain
2 anything other than that data. If Exhibit 14 is not admitted, Ms. San Augustine will have to go
3 through each computer printout, reading into the record, 55 times for each exhibit, the content
4 related to the charged offenses, line by line. This surely qualifies as evidence which cannot be
5 conveniently presented in court.

6 The cases cited by the defense are not on point, because they do not involve FRE 1006
7 and the summary of voluminous data. United States v. Wood, 943 F.2d 1048, 153 (9th Cir. 1991,
8 for example, upheld the admissibility of government charts which summarized the expert
9 testimony of an IRS agent during a prosecution for tax fraud. The charts were data summaries,
10 but configured to support his expert opinion. Although Wood cited FRE 1006, in fact the
11 exhibits were not simply a voluminous summary of data. The authorities cited by Wood as
12 precedent did not rely upon FRE 1006 at all. United States v. Abbas, 504 F.2d 123 (9th Cir.
13 1974) concerned a summary of witnesses' testimony, not documents, and does not cite FRE
14 1006. United States v. Soulard, 730 F.2d 1292 (9th Cir. 1984), involved a false corporate tax
15 case tried on the "bank deposit method" to determine whether the defendant had under-reported
16 his income. The government had introduced voluminous bank records as evidence and was
17 permitted to use a summary chart during argument. It appears, however, that the summary was
18 not of the bank records data, but of the government expert's explanation of how the "bank
19 deposit method" was analyzed. Again, the court did not cite FRE 1006 in its decision.

20 Likewise, United States v. Poschwatta, 829 F.2d 1477 (9th Cir. 1987) (overruled on other
21 grounds), concerned the admissibility of exhibits showing the schedules of income for the
22 defendant, for the three years he was charged with tax fraud. Again, the exhibit was not a
23 summary of voluminous data. Nevertheless, the court held the exhibit was admissible:

24 "The figures in the government chart were admitted into evidence
25 and the defendant did not challenge the figures. Defendant also had
26 a full opportunity to cross-examine the witness. The charts arguably
contributed to the clarity of the presentation to the jury and were a
reasonable method of presenting evidence." Id. at 1481.

1 The court made this ruling, however, without any reference to FRE 1006.

2 United States v. Catabran, 836 F.2d 453 (9th Cir. 1988), is directly on point. The
3 defendant was charged with bankruptcy fraud for concealing assets of his waterbed company,
4 “Bedder Nights.” The allegation were that he transferred its assets into a new company before
5 Bedder Nights went into Chapter 7. To prove that the old company had a large inventory, the
6 government introduced general ledger computer printouts, and a chart summarizing the
7 inventory data. The court affirmed his conviction, holding the computer records were admissible
8 as business records, and the summary admissible pursuant to FRE 1006.

9 Whether to admit an exhibit which summarizes evidence already in the record is up to the
10 sound discretion of the trial court. In United States v. Boulware, 470 F.3d 931 (9th Cir. 2006),
11 vacated on other grounds, 128 S.Ct. 1168 (2008), the government had charged tax fraud for
12 assets the defendant had diverted from his corporation and which he contended were nontaxable
13 returns of capital rather than income. Boulware approved the admission of government charts
14 summarizing the financial transactions over the relevant period. The underlying data was
15 admissible, there was no dispute as to the charts’ accuracy, the summary witness was available
16 for cross-examination, and there was a limiting instruction.

17 The general rule is set forth in 29A Am.Jur.2d Evidence § 1061. Summaries are allowed
18 as evidence when the underlying documents cannot be conveniently examined.

19 “Where the underlying documents are introduced as well as the
20 summaries, the court may instruct the jury that the summaries
21 (and the witness’ explanation of them) are not evidence in and
of themselves and that if the summaries do not correctly reflect
the underlying evidence the jury should disregard them.”

22 United States v. Green, 428 F.3d 1131 (8th Cir. 2005) illustrates this procedure.
23 Defendant was charged with social security fraud, for purchasing computers with stolen
24 identities. The government introduced voluminous records from the companies defrauded. The
25 court allowed the introduction of four charts, which summarized the data by individual
26 transactions and by total transactions in spreadsheet format. The Eighth Circuit upheld the
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1 admission of these charts. It noted with approval that the trial judge had given a limiting
2 instruction, as follows:

3 “You may use these summaries or charts as evidence. It is for you
4 to decide how much weight, if any, you will give to them. In making
5 that decision, you should consider all the testimony you heard about
6 the way in which they were prepared.” Id. at 1133.

7 Accordingly, Exhibit 14 (and 68-73) should be admitted as evidence, with a limiting
8 instruction such as that given in Green.

9 V. ADMISSIBILITY OF CO-DEFENDANTS STATEMENTS

10 Although his memorandum appears to concern conspiracy, Pangelinan asserts as p. 3 that
11 the government intends to introduce Lee’s statements concerning her co-defendants. To the
12 contrary, the government trial brief dealt with the issue of which exculpatory and incriminating
13 statements should be admitted. The statements of all the co-defendants are set forth in Exhibits
14 16 through 30 of its trial brief, redacted by high-lighting the portions of the statements which it
15 believes admissible. The permitted testimony of the respective FBI agents should be resolved
16 prior to their taking the stand.

17 A. There appear to be no Bruton objections

18 The government’s proposed redacted interviews have removed some statements which
19 are obviously prohibited by Bruton v. United States, 391 U.S. 123 (1986). For example, in the
20 last paragraph of Exhibit 16, Lee admitted that her co-defendants were accepting her clients’
21 applications without scrutiny, because they were friends. This clearly is not admissible during
22 the government’s case in chief. This holds true for Laserna’s confession in Exhibit 20. Laserna
23 admitted knowingly taking copies from Lee, but blamed Mary Garcia, who told him to accept
24 them. In Exhibit 22, Laserna admitted that anyone other than Lee would have been rejected, had
25 they failed to present original supporting documents. He then added that the other examiners
26 were also accepting Lee’s copies. His remark concerning the conduct of other examiners is
27 another obvious Bruton problem.

28 On the other hand, the government may introduce other statements, to which the

1 defendants have not objected. Absent any such objections, the government assumes that
2 defendants agree they do not involve Bruton. In particular, the government may introduce the
3 following testimony from Exhibit 17. In the last paragraph of page 2 of her December 24, 2007,
4 interview, Lee said that she had tried submitting copies of ITINs in the new format instituted by
5 the IRS after December 17, 2003: the letters were typed on paper which had "void" embedded in
6 it, so that a person could not hope to pass off a copy for an original. Lee said that the examiners
7 had rejected such patently phoney letters when she submitted them. This is evidence the
8 defendants knew that Lee was trying to get driver's licenses by using false ITINs.

9 VI. HEARSAY

10 Defendants do not dispute that the last paragraph of Lee's December 24, 2007, statement,
11 (Exhibit 17, p. 3) is hearsay. It is an out-of-court statement which cannot be used as evidence for
12 the truth of the matter asserted, that Lee's co-defendants did not know her ITIN letters were
13 fakes.

14 Defendants do not dispute the rule that exculpatory statements are inadmissible hearsay
15 under FRE 801(d)(2). Nor do they dispute the holding of Williams v. United States, 512 U.S.
16 594 (1994), that if the defendant makes both incriminating and exculpatory statements,
17 intermixed, the statement must be redacted. Rather, they assert that the statements are all either
18 one or the other, and hence are 100% admissible or 100% excludable.

19 Whether a statement is incriminating depends on the nature of the government's case.
20 The statement "I was standing outside the front entrance of K-Mart at midnight on May 1" may
21 be incriminating if police are investigating a murder which occurred outside the front entrance
22 of K-Mart at midnight on May 1. On the other hand, if police are investigating a murder at that
23 time and date which occurred elsewhere, the statement is exculpatory.

24 The government's prosecution is mirrored in Lee's confession: that the same rules which
25 obtained to everyone else, did not apply to her. For her, the defendants waived the rules, and
26 accepted her clients' applications without any scrutiny, and without requiring her clients to have
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1 the original documents which everyone else had to produce. Her co-defendants knew they were
2 violating the rules, that they had no authority to give Lee special treatment. Hence, they were
3 knowingly producing driver's licenses unlawfully.

4 Laserna ultimately confessed to this offense. As did the other examiners, he knew an
5 original SS or TIN document was mandated, yet he knowingly exempted Lee from this
6 requirement (but it was at Mary Garcia's direction). The other defendants, however, all denied
7 ever accepting copies of TINs from anyone, including Lee. Their statements are incriminating
8 because they demonstrate defendants knew the rules. They are also incriminating if the
9 government proves they are lies, that the defendants denied giving Lee special treatment in an
10 effort to avoid prosecution.

11 Whether they were being paid by Lee is irrelevant. Although motive is a useful indicia of
12 guilt, it is not required for a prosecution under 18 U.S.C. § 1028. All the government has to
13 prove is that the defendants were knowingly violating MVD's rules to produce driver's licenses
14 for Lee. It does not have to prove why they did it.

15 VII. CONSPIRACY

16 The government generally agrees with the memorandum filed by Mary Garcia, with the
17 exception of her conclusion. The government does not have to prove defendant knew a
18 particular course of conduct was illegal: ignorance of the law is no defense.

19 Defendant Pangelinan's memorandum is also incorrect in its conclusion that a conspiracy
20 must be established before the co-conspirators' statements can be "introduced." The government
21 must prove a conspiracy exists before the statements of co-conspirators can be considered as
22 evidence, i.e., before they can go to a jury. The statements can be introduced conditionally,
23 pending a ruling that the conspiracy has been independently proven.

24 No one disputes that statements by co-conspirators in furtherance of a conspiracy are
25 admissible under FRE 801(d)(2)(E). "The declarant's intent and not the actual effect is what is
26 important. ... While mere conversations or narrative declarations are not admissible under this
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1 rule, statements made to induce enlistment, further participation, prompt further action, allay
2 fears or keep coconspirators abreast of an ongoing conspiracy's activities are admissible.
3 United States v. Arias-Villaneuva, 998 F.2d 1491, 1502 (9th Cir. 1993). Thus, the statements of
4 persons recruiting customers for Lee are in furtherance of the scheme because they are made
5 with the intent to enlist further customers.

6 Whether statements are made in furtherance of a conspiracy naturally depends on what
7 conspiracy is charged. The parameters of the conspiracy are defined by the indictment. The
8 indictment defines this conspiracy as one between Lee, the MVD examiners, and the persons
9 illegally purchasing Guam driver's licenses. Thus, any statements made by Lee or other persons
10 in furtherance of the scheme to unlawfully purchase Guam licenses, are admissible. Each of the
11 licenses purchased is alleged as an overt act made in furtherance of the scheme. The government
12 must prove at least one overt act to support a conviction on each conspiracy. Therefore,
13 statements made to further the commission of an overt act are necessarily made in furtherance of
14 the conspiracy.

15 The evidence will show that Lee and each of the charged examiners had an agreement, to
16 produce driver's licenses unlawfully. Each examiner's role in the conspiracy was to facilitate
17 this production by accepting Lee's applications without question, and without requiring the
18 supporting documents everyone else had to submit. This agreement allowed Lee to recruit
19 buyers, charge them a fee, and successfully obtain 54 illegal licenses over a 22-month period.
20 Frequently, the license purchaser was referred to Lee by a friend, who contacted Lee and paid
21 her money on behalf of the buyer. The buyers and their friends joined that conspiracy when they
22 paid Lee to obtain an illegal license from that examiner.

23 Dong Sik Jung is a typical example; his conduct is charged as an overt act in ¶ 57. Jung
24 came to Guam to start a business with a Mr. Suh, who secured an apartment for Jung in the Pia
25 Marine, where Suh lived with his wife Ji Eon Lee. Jung overstayed his tourist visa and remained
26 on Guam illegally. When he told Suh he wished he could get a driver's license, Suh said it
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1 would be easy, that his wife was getting one and he could help Jung get one also. Jung paid Suh
2 \$1,000. On January 18, 2005, Ji Eon Lee drove Jung to the old MVD, where they met Eun
3 Young Lee. She took them inside and filled out driver's license applications for both. Then she
4 took them up to the window, where defendant Untalan was on duty. Lee gave Untalan both
5 applications, the subjects' passports and their Korean driver's licenses. She did not give Untalan
6 any TIN or SS documents, neither originals nor copies. Untalan processed the applications
7 without question. On January 22, 2005, Ji Eon Lee drove Jung to the UOG, where they took the
8 written test, in Korean, and passed. On January 27, 2005, Ji Eon Lee drove Jung to the MVD,
9 where Lee got her license. Jung, however, had forgotten his glasses, and had to go back later.

10 Thus, there were five conspirators to the crime of unlawfully producing a driver's license
11 for Jung: Ina Lee, Untalan, Ji Eon Lee, Suh, and Jung himself. The statement made by Suh, that
12 Jung could obtain a driver's license for \$1,000, was made in furtherance of the charged
13 conspiracy, i.e., in furtherance of unlawfully securing a license for Jung. Hence, it is admissible.

14 Defendants confuse the nature of these statements with the question whether a conspiracy
15 can be proved independently of the statements. The statements are clearly in furtherance of the
16 charged conspiracy. If the government fails to present independent evidence of the conspiracy
17 alleged in the indictment, then necessarily the jury must be instructed to disregard the statements.
18 But that comes at the end of the government's case; it does not affect the admissibility of these
19 statements at the beginning.

20 Respectfully submitted this 27th day of May, 2008.

21 LEONARDO M. RAPADAS
22 United States Attorney
23 Districts of Guam and NMI

24 By: /s/ Karon V. Johnson
25 KARON V. JOHNSON
26 Assistant U.S. Attorney
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